

**LEGAL SERVICES CORPORATION  
OFFICE OF INSPECTOR GENERAL**

**APPENDIX A:  
  
COMPLIANCE SUPPLEMENT  
FOR AUDITS OF LSC RECIPIENTS**

December 1997

*Supersedes "Appendix A" contained in the Audit Guide for Recipients and Auditors (November 1996) ("Audit Guide")*

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## COMPLIANCE SUPPLEMENT FOR AUDITS OF LSC RECIPIENTS

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The "**Compliance Supplement for Audits of LSC Recipients**" ("Compliance Supplement") describes specific regulatory compliance requirements that apply to all recipients of LSC funds. Compliance requirements are the responsibility of LSC management and have been provided by management for inclusion in this supplement. The requirements, if not observed, could have a direct or indirect material effect on the financial statements. Regulatory requirements relating to practice **prohibitions, restrictions and requirements** are considered to have a material impact on the LSC program (110 Stat. 1321 (1996)). Assessing compliance with these particular regulations is part of the annual audit of LSC recipients conducted under the general guidance of Office of Management and

Budget (OMB) Circular A-133 for audits of non-profit institutions.

Beginning with the 1996 appropriation of Federal funds to the Legal Services Corporation ("Corporation" or "LSC"), the recipients are required to adhere to new **prohibitions, restrictions and requirements** (Section 504(b) of 110 Stat. 1321 (1996)). Although recipient adherence to all LSC regulations is required, the regulations covering practice **prohibitions, restrictions and requirements** under the FY96 appropriations act (Public Law 104-134, 110 Stat. 1321) carry special reporting requirements. (See Section I.9.C of the Audit Guide.) These regulations are identified in the text of the Compliance Supplement with an "\*" and are as follows:

- \*PART 1610 - USE OF FUNDS FROM SOURCES OTHER THAN THE CORPORATION
- \*PART 1612 - RESTRICTIONS ON LOBBYING AND CERTAIN OTHER ACTIVITIES
- \*PART 1617 - CLASS ACTIONS
- \*PART 1620 - PRIORITIES IN USE OF RESOURCES
- \*PART 1626 - RESTRICTIONS ON LEGAL ASSISTANCE TO ALIENS
- \*PART 1627 - SUBGRANTS AND DUES
- \*PART 1632 - REDISTRICTING
- \*PART 1633 - RESTRICTION ON REPRESENTATION IN CERTAIN EVICTION PROCEEDINGS
- \*PART 1635 - TIMEKEEPING REQUIREMENT
- \*PART 1636 - CLIENT IDENTITY AND STATEMENT OF FACTS
- \*PART 1637 - RESTRICTIONS ON LITIGATION ON BEHALF OF A PRISONER
- \*PART 1638 - RESTRICTION ON SOLICITATION
- \*PART 1639 - WELFARE REFORM
- \*PART 1642 - ATTORNEYS' FEES

The **special reporting requirements** (Section 509(b) of 110 Stat. 1321 (1996)) are carried out through the **"Special Report on Noncompliance with Laws and Regulations."** The auditor is to select and test a representative number of transactions and report to the recipient during the course of the audit all instances of noncompliance relating to the "\*" regulations. **For purposes of the special reporting requirements only, these instances of noncompliance shall include those relating to substantive practice issues and not to procedural or administrative items.** The recipient is to then report in writing to the Office of Inspector General (OIG) within five business days the instances of noncompliance found by the auditor. If the recipient fails to notify the OIG within the specified time, the auditor must report the noncompliance directly to the OIG. (See Section II.1.H of the Audit Guide.) This process of referring the instances noted in the **"Special Report on Noncompliance with Laws and Regulations"** is referred to as the **"Five-Day Letter."**

## Overview

This Compliance Supplement is divided into three parts. Part A describes costs standards and principles applicable to recipients of LSC funds. Part B provides a brief overview of certain restrictions and requirements on LSC recipients and includes a timetable detailing the effective dates for the interim and final regulations issued by the Corporation during 1997. Part C identifies compliance requirements that are specific to the Corporation's grant programs, with reference to the specific Code of Federal Regulations (CFR) or statutory citations, where applicable.

Part C also provides suggested audit procedures to assist the auditor in planning and performing tests of the recipient's compliance with these requirements. Auditor judgment will be necessary to determine whether the suggested audit procedures are sufficient and whether additional or alternative audit procedures are needed. Determining the nature, timing, and extent of the audit procedures necessary to meet the audit objectives is the auditor's responsibility.

Suggested audit procedures are the responsibility of the OIG. These procedures are not mandatory and do not preclude the use of the auditor's professional judgment in developing additional or alternative procedures based on the conditions noted by the auditor during the audit. The suggested procedures provide sufficient flexibility to permit the auditor to perform dual tests to accomplish the overall compliance objectives.

Auditors performing an audit using this Compliance Supplement are required to review the LSC Act and regulations (including the regulations' supplementary information) to obtain an understanding of the compliance requirements. The compliance requirements detailed in this Compliance Supplement reflect those required pursuant to the respective Final Regulation published by LSC. Effective dates for the regulations not in effect from the beginning of calendar year 1997 are detailed in Part B. Unless otherwise instructed in this Compliance Supplement, compliance is to be assessed relative to the final regulation.

Auditors must recognize that laws and regulations change periodically and that delays may occur between such changes and updates to this Supplement. Furthermore, auditors must be aware that there may be provisions of contracts and grant agreements that are unique to a particular LSC recipient. The specific requirements of any such arrangements between the recipient and LSC are not detailed in this Supplement, but are to be identified and assessed by the auditor for the audit period. Finally, pursuant to 42

U.S.C. 2996g(b), LSC has prescribed certain specific recordkeeping requirements (by providing recipients with forms and procedures) **effective January 30, 1998.**<sup>1</sup>

This Compliance Supplement is effective for audits of fiscal years beginning after December 31, 1996 and supersedes the previous edition of the Compliance Supplement issued in 1996.

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## PART A. ALLOWABLE COSTS/COST PRINCIPLES

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The Corporation's cost principles provide that LSC funds may not be charged for any costs which do not serve LSC cost objectives. The LSC Act, the annual appropriations acts and the Corporation's rules, regulations and guidelines, including the Accounting Guide for LSC Recipients (August 1997) establish the relevant cost principles for testing compliance under this Compliance Supplement. OMB Circular A-122, "Cost Principles for Nonprofit Organizations," provides guidance for all allowable cost questions when relevant policies or criteria in the circulars are not inconsistent with the aforementioned laws, rules, regulations, and guidelines. (45 CFR § 1630.4(g)).

### ALLOWABLE COSTS

The auditor should determine whether costs meet the criteria governing allowability as defined in 45 CFR § 1630.4, i.e., that the cost is:

- 1) actually incurred during the effective term of the grant;
- 2) reasonable and necessary for the provision of legal services for eligible clients or for the accomplishment of another function specified in the grant or contract;
- 3) allocable to such functions;
- 4) in compliance with the Act, applicable appropriation acts, Corporation rules, regulations, guidelines and instructions, the accounting provisions of the Corporation Audit and

- Accounting Guide for Recipients and Auditors, and the terms and conditions of the grant or contract;
- 5) consistent with policies and procedures that apply uniformly to Corporation-financed and other activities of the recipient;
  - 6) accorded consistent treatment;
  - 7) determined in accordance with generally accepted accounting principles;
  - 8) not used to meet cost sharing or matching requirements of any other federally financed program, unless the agency whose funds are being matched determines in writing that Corporation funds may be used for federal matching purposes; and
  - 9) adequately and contemporaneously documented.

A cost is "reasonable" if, in its nature or amount, it does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the cost. In determining the reasonableness of a given cost, consideration shall be given to: (1) whether the cost is for a type generally recognized as ordinary and necessary for the operation of the recipient or the performance of the grant or contract; (2) the restraints or requirements imposed by such factors as generally accepted sound business practices, arms-length bargaining, federal and state laws and regulations, and the terms and conditions of the grant or contract; (3) whether the

individuals concerned acted with prudence under the circumstances, considering their responsibilities to the recipient, its clients and employees, the public at large, the Corporation, and the federal government; and (4) significant deviations from the established practices of the recipient which may unjustifiably increase the grant or contract costs (45 CFR § 1630.4(b)).

A cost is allocable to a particular cost objective, such as a grant, project, service, or

other activity, in accordance with the relative benefits received. A cost is allocable to a Corporation grant or contract if it is treated consistently with other costs incurred for the same purpose in like circumstances and if it: (1) is incurred specifically for the grant or contract; (2) benefits both the grant or contract and other work and can be distributed in reasonable proportion to the benefits received; or (3) is necessary to the overall operation of the recipient, although a direct relationship to any particular cost objective cannot be shown (45 CFR § 1630.4(c)).

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## **PART B.**

## **RESTRICTIONS ON LSC GRANTEES**

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LSC's FY 1996 appropriations act, 110 Stat. 1321 (1996), signed into law on April 26, 1996, established new restrictions on the work that LSC recipients are allowed to do. These new restrictions and requirements were generally effective on the date of enactment. LSC's FY 1997 appropriations act, Public Law 104-208, continued these requirements and restrictions.

### **PREVIOUS TRANSITION PERIOD**

Section 504 of 110 Stat. 1321 (1996) required recipients to withdraw immediately from certain restricted activities. These included: redistricting activity; proscribed administrative and legislative advocacy activity; proscribed public policy training; abortion cases; welfare reform advocacy; and drug-related public housing eviction cases. Section 508(b) permitted recipients to continue to provide legal assistance in cases or matters begun prior to April 26, 1996 in three areas proscribed by Section 504: class actions (Sec. 504(a)(7)); legal assistance for certain categories of aliens (Sec. 504(a)(11)); and litigation on behalf of prisoners (Sec. 504(a)(15)). Such legal assistance in pre-existing matters was permissible until August 1, 1996.

The Corporation implemented a process for reporting cases and matters pursuant to Sections 508(b) and (c). The use of LSC forms for such reporting was required, including the submission of a certification form. Copies of these forms should be available for inspection by the auditor.

Section 504(a)(13) also prohibited recipients from claiming, or collecting and retaining, attorneys' fees. Recipients, however, were not prohibited from claiming, etc., such fees in cases pending on April 26, 1996, including class actions (except that recipients were prohibited from claiming fees on any additional related claim for which legal assistance was provided on or after April 26, 1996).

### **REQUIREMENTS**

#### Timekeeping

All recipients of LSC funds are required to account for the time spent on all cases, matters, and supporting activities by their attorneys and paralegals, whether funded by LSC or by other sources (45 CFR § 1635). The auditor should familiarize himself/herself with 45 CFR § 1635.3, which details the specific requirements of a recipient's timekeeping system.

#### Policies, procedures and recordkeeping

The auditor is expected to obtain an understanding of the policies, procedures and recordkeeping in place to ensure compliance with the LSC Act and regulations and LSC's FY 1996 appropriations act, Public Law 104-134, 110 Stat. 1321 (1996). The recipient shall have internal control systems to provide reasonable assurance that it is managing funds, regardless of source, in compliance with Federal laws and regulations.



Written policies, procedures and recordkeeping must have been adopted by the recipient in accordance with the regulations as detailed below: (a) **Policies, procedures and recordkeeping** - Parts 1612 (Lobbying), 1620 (Priorities), 1626 (Alien representation), 1627 (Subgrants and dues), 1633 (Eviction proceedings), 1636 (Client identity), 1637 (Prisoner representation), and 1642 (Attorneys' fees); (b) **Policies and procedures**

- Parts 1609 (Fee-generating cases), 1617 (Class actions) and 1639 (Welfare reform); © **Policies** - Parts 1632 (Redistricting) and 1638 (Solicitation); and (d) **Accounting records** - Part 1610 (Use of non-LSC funds).

## EFFECTIVE DATES OF SPECIFIC REGULATIONS

Many of the regulations listed in this Compliance Supplement were adopted as Interim Regulations in 1996 and then adopted as final in 1997. Thus, the Interim Regulation was in effect for some portion of 1997 before the final took effect. The effective dates and dates of publication of these regulations are listed below.

Final Regulation Effective	Interim Regulation Effective
45 CFR 1609 -- May 21, 1997	None, but see Interim 45 CFR 1642 which superseded much of the prior 45 CFR 1609 on August 29, 1996.
45 CFR 1610 -- June 20, 1997	March 14, 1997 (62 F.R. 12101). This regulation superseded §1610.7, added §1610.8 and changed some definitions in §1610.2. From January 1 to March 14, 1997, the prior final 45 CFR 1610, published December 2, 1996 (61 F.R. 63749) was in effect.
45 CFR 1612 -- May 21, 1997	Interim Part 1612, August 29, 1996 (61 F.R. 45745)
45 CFR 1617 -- January 1, 1997	Interim Part 1617, August 13, 1996 (61 F.R. 41963)
45 CFR 1620 -- May 21, 1997	Interim Part 1620, August 29, 1996 (61 F.R. 45747)
45 CFR 1626 -- May 21, 1997 Except §§1626.2(f), 1626.2 (g) & 1626.4 effective April 21, 1997.	Interim Part 1626, August 29, 1996 (61 F.R. 45751)
45 CFR 1626, §1626.2(f) was further amended effective Sept. 29, 1997	
45 CFR 1627 -- May 21, 1997	Interim Part 1627, August 29, 1996 (61 F.R. 45753)
45 CFR 1632 -- January 1, 1997	Interim Part 1632, August 13, 1996 (61 F.R. 41964)

45 CFR 1633 -- January 1, 1997	Interim Part 1633, August 13, 1996 (61 F.R. 41965)
45 CFR 1636 -- May 21, 1997	Interim Part 1636, August 29, 1996 (61 F.R. 45740)
45 CFR 1637 -- May 21, 1997	Interim Part 1637, August 29, 1996 (61 F.R. 45754)
45 CFR 1638 -- May 21, 1997	Interim Part 1638, August 29, 1996 (61 F.R. 45755)
45 CFR 1639 -- July 7, 1997	Interim Part 1639, August 29, 1996 (61 F.R. 45757)
45 CFR 1642 -- June 11, 1997	Interim Part 1642, August 29, 1996 (61 F.R. 45762)

Differences between the Interim and the Final Regulations were relatively minor in many of these regulations. Some of the more significant changes are listed below <sup>2</sup>:

**45 CFR 1610** -- §1610.8 was significantly changed in the Final Regulation. In particular, the Interim Rule (effective March 14 through June 19, 1997) had a two-part test for program integrity, the first part of which was whether the organization conducting restricted activities was controlled by the recipient and the second part of which was whether the relationship met the standards of objective integrity and independence (§1610.8(a) of the Final Regulation). In the Final Rule, the control portion of the standard for program integrity was eliminated and the applicability of program integrity standards was extended to any relationship with an organization that conducts restricted activities.

From January 1 until March 14, 1997, the prior 45 CFR 1610 was in effect. It included rules governing the transfer of non-LSC funds in §1610.7 and had no section corresponding to current §1610.8. Relationships with other organizations were regulated by §1-7 of the 1986 Audit and Accounting Guide for Recipients and Auditors, containing a control standard similar to §1610.8 of the Interim Regulation, but contained no Program Integrity standard. <sup>3</sup> If you encounter Program Integrity questions that are significantly affected by conduct occurring between January 1 and June 20, 1997, you should contact the Corporation for detailed guidance.

**45 CFR 1626** -- §§1626.2(f), 1626.2(g), and 1626.4, “Kennedy Amendment”, provisions allow services to otherwise ineligible aliens in cases of “battery or extreme cruelty.” Although these provisions were not in the Interim Rule, since the Kennedy Amendment took effect on October 1, 1996, representation allowable under the Final Rule should not be questioned even in the period from October 1, 1996 through April 21, 1997 before these Final Regulation provisions took effect.

**45 CFR 1637** --§1637.2(b) was revised to exclude facilities for the mentally ill from the definition of prisons, so that the prohibition on prisoner litigation does not apply to litigation on behalf of persons confined in institutions for the mentally ill.

**45 CFR 1639** -- §1639.2(a) of the Final Rule greatly expands the scope of the prohibition by expanding the definition of welfare reform to include all the provisions of the welfare reform bill passed in 1996, except those relating to child support. The Interim Rule contained a much narrower definition limited to AFDC and State General Assistance programs. Also §1639.2(b) of the Final

Rule establishes that “existing law” which may not be challenged if it is part of welfare reform includes regulations formally promulgated pursuant to public notice and comment. The Interim Rule cited only Federal, State and local laws or ordinances.

**45 CFR 1642** -- §1642.2(a) of the Final Rule expanded the prohibition on claiming and collecting attorneys’ fees to include fees awarded from a client’s back award in Social Security cases. Attorneys’ fees in such cases were allowed under the Interim Rule.

A proposed revision of 45 CFR 1630 was published for comment on August 29, 1997 at 62 F.R . 45778. The effective date of the final version of this regulation will be no earlier than January 1 , 1998, so it will not apply to recipient activities during 1997.

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## PART C.

## COMPLIANCE REQUIREMENTS

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**The compliance requirements included under this section are summaries and not the full text of the regulation or statutory provision. Auditors shall review the actual regulation or statutory provision in order to have a full understanding of the requirements.**

### Introduction

The specific requirements for allowable or unallowable activities are detailed in the regulations and applicable statutory provisions. In order to assist the auditor, the specific compliance requirements are provided in summary form under this part, together with suggested audit procedures unique to the specific compliance requirement. To reduce repetition, suggested audit procedures that can be applied generically are detailed below.

- *Audit Objectives*  
Determine whether LSC grant awards were expended only for allowable activities.
- *Suggested Audit Procedures to determine Allowability of Specific Transactions and Activities*
  - a. Identify the types of activities which are either specifically allowed or prohibited.
  - b. When allowability is determined based upon summary level data, perform procedures to verify that:
    - Activities were allowable.
    - Individual transactions were properly classified and accumulated into the activity total.
  - c. When allowability is determined based upon individual transactions, select a sample of transactions and perform procedures to verify that the transaction was for an allowable activity.
  - d. The auditor should be alert for large transfers of funds from recipient accounts which may have been used to fund unallowable activities.
  - e. Case/matter file selection and review
    - (1) Obtain an understanding of the recipient's case management system in order to select a representative sample of case files. This sample shall be sufficiently comprehensive in order to include cases/matters opened, cases/matters with ongoing activity and cases/matters closed during the audit period.
    - (2) During this review of case files, specific attention shall be given to assessing compliance with the applicable requirements of 45 CFR §§ 1609, 1613, 1615, 1617, 1620, 1626, 1632, 1633, 1636, 1637, 1639 and the other statutory prohibitions identified in this Compliance Supplement.

## **Specific requirements**

### **1608 PROHIBITED POLITICAL ACTIVITY**

#### **LSC Regulations**

45 CFR §§ 1608.3, 1608.4, 1608.5 and 1608.6

#### **Compliance Requirement**

While employed under the LSC Act, no staff attorney (as defined at 45 CFR § 1600.1) shall, at any time, (a) use official authority or influence for the purpose of interfering with or affecting the result of an election or nomination for office, whether partisan or nonpartisan; (b) directly or indirectly coerce, command or advise an employee of any recipient to pay, lend, or contribute anything of value to a political party, or committee, organization, agency or person for political purposes; or (c) be a candidate for partisan elective office (45 CFR § 1608.5). For purposes of the LSC regulations, the term “political” refers to “that which relates engendering public support for or opposition to candidates for public office, ballot measures, or political parties, and would include publicity or propaganda used for that purpose (45 CFR § 1600.1).

LSC funds, personnel or equipment cannot be used or made available to any

political party or association, to the campaign of any candidate for public or party office, or for use in advocating or opposing any ballot measure, initiative or referendum (45 CFR § 1608.3(b)).

LSC funds may not be used or made available for, and while engaged in legal assistance activities supported under the LSC Act, no attorney may engage in, any activity to provide voters with transportation to the polls or any similar assistance in connection with an election, or any voter registration activity (45 CFR §§ 1608.4(b), 1608.6).

However, these requirements do not prohibit an attorney from providing any form of legal assistance to an eligible client, and may not interfere with the fulfillment of any attorney's professional responsibilities to a client (45 CFR § 1608.7).

#### **Suggested Audit Procedures**

- Review policies or recipient practices in place to ensure that no recipient and/or employee or attorney of the recipient undertakes an activity in violation of 45 CFR §§ 1608.3(b), 1608.4, 1608.5, 1608.6, and 1608.7.
- Determine how the recipient ensures that the policies/practices are effectively communicated to staff and whether these policies/practices are followed by staff. Interview recipient staff as to their knowledge concerning the possible existence of any political activity.

- Determine that the recipient did not expend grant funds or contribute personnel or equipment in violation of the requirements of 45 CFR § 1608.3(b).
- Examine expenditures for payments or contributions :
  - a) to any political party or association;
  - b) to the campaign of any candidate for public or party office; and
  - c) for use in advocating or opposing any ballot measure, initiative , or referendum.

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## 1609 FEE-GENERATING CASES

### LSC Regulations

45 CFR §§ 1609.2, 1609.3 and 1609.4

### Compliance Requirement

Definition of a fee-generating case: any case or matter which, if undertaken on behalf of an eligible client by an attorney in private practice, reasonably may be expected to result in a fee for legal services from an award to a client, from public funds or from the opposing party (45 CFR §1609.2(a)).

Excluded from definition of fee-generating case: any case where (1) a court appoints a recipient or an employee of a recipient to provide representation in a case pursuant to a statute or a court rule or practice equally applicable to all attorneys in the jurisdiction, or (2) a recipient undertakes representation under a contract with a government agency or other entity (45 CFR §1609.2(b)).

Recipients may not use Corporation or private funds to provide legal assistance in a fee-generating case unless:

(1) the case was rejected by a local lawyer referral service or by two private attorneys; or

(2) neither the referral service nor two private attorneys would consider the case without payment of a consultation fee (45 CFR §1609.3(a)).

Recipients may provide legal assistance in a fee-generating case without first attempting referral only when:

(1) An eligible client is seeking benefits under Subchapter II of the Social Security Act, 42 U.S.C. 401 et seq., as amended, Federal Old Age, Survivors, and Disability Insurance Benefits; or Subchapter XVI of the Social Security Act, 42 U.S.C. 1381 et seq., as amended, Supplemental Security Income for Aged, Blind, and Disabled;

(2) The recipient, after consultation with appropriate representatives of the private bar, has determined that the type of case is one that private attorneys in the area served by the recipient ordinarily do not accept, or do not accept without prepayment of a fee; or

(3) The director of the recipient, or the director's designee, has determined that

referral of the case to the private bar is not possible because:

- (I) Documented attempts to refer similar cases in the past generally have been futile;
- (ii) Emergency circumstances compel immediate action before referral can be made, but the client is advised that, if appropriate, and consistent with professional responsibility, referral will be attempted at a later time; or
- (iii) Recovery of damages is not the principal object of the recipient's client's case and substantial statutory

attorneys' fees are not likely to be available (45 CFR §1609.3(b)).

For requirements concerning fees in a properly undertaken fee-generating case, see 45 CFR Part 1642.

Each recipient must have written policies and procedures to guide its staff in complying with this rule and must maintain records sufficient to document the recipient's compliance with this rule (45 CFR §1609.4).

### **Suggested Audit Procedures**

- Review the recipient's policies or practices to ensure that fee-generating cases are accepted by the recipient in accordance with the requirements of 45 CFR § 1609.
- Review whether procedures have been established for referral of fee-generating cases and evaluate whether the procedures conform to the requirements of 45 CFR § 1609.3.
- Determine how these policies or practices are communicated to staff and whether such policies/practices are followed by staff. Interview a sample of recipient staff, including intake workers, as to their knowledge concerning the possible existence of any fee-generating case that was undertaken improperly by the recipient. Follow up on all such possible occurrences to determine if the case was a fee-generating case and if representation was authorized pursuant to the regulation.

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## **\*1610 USE OF FUNDS FROM SOURCES OTHER THAN THE CORPORATION**

### **LSC Regulations**

45 CFR § 1610

### **Compliance Requirement**

#### Overview

(a) LSC Act Restrictions --  
Longstanding restrictions on recipients'

activities are contained in the LSC Act and newer, more numerous restrictions are contained in LSC appropriations (Pub. L. 104-134, and continued by Pub. L. 104-208). LSC Act restrictions apply to LSC funds with significant extensions to private funds, but allow public, IOLTA and tribal<sup>4</sup> funds to be used for the purposes for which they are granted.

(b) Appropriations Act Restrictions -- Most of the appropriations act restrictions are “entity restrictions” forbidding recipients of LSC funds from conducting restricted activity with any funds (with a narrow exception for Indian tribal funds). Most appropriations act restrictions took effect as of April 25, 1996, although a few specific requirements have later effective dates. With a few exceptions discussed below under §1610.7, any transfer of LSC funds to another entity carries appropriations act restrictions (and LSC Act restrictions on private funds) along with it to all of that entity’s funds. Transfer of non-LSC funds does not carry restrictions along with it. Regardless of whether funds are transferred to another entity, the extent to which a recipient may share staff and facilities with another organization that conducts restricted activities is limited by the program integrity standards of §1610.8.

#### Specific restrictions

##### *Use of Funds for Restricted Activities*

The LSC Act restrictions are listed under the rubric of “purpose prohibited by the LSC Act” at §1610.2(a). LSC funds and private funds may not be used for these activities; but public, IOLTA or tribal funds may be so used, provided the use is consistent with the purposes for which they were

provided (45 CFR §§1610.2(a), 1610.2(c), 1610.2(e), 1610.2(f), 1610.4(b)).

The appropriations act restrictions are listed under the rubric of “activity prohibited by or inconsistent with section 504” at §1610.2(b). With exceptions discussed immediately below, no recipient funds, whether LSC or non-LSC, may be used for such activities (45 CFR §§1610.2(b), 1610.3). These exceptions are: (1) Indian tribal funds may be used for the specific purposes for which they were provided (45 CFR §§1610.2(h), 1610.4(a)); (2) restrictions governing representation in criminal proceedings and collateral attacks on criminal convictions, prisoner litigation and representation of aliens do not apply to (a) a recipient's or subrecipient's separately funded public defender program or project; or (b) criminal or related cases accepted by a recipient or subrecipient pursuant to a court appointment (45 CFR §1610.6). Both these exceptions also apply to LSC Act prohibitions discussed below (45 CFR §§1610.4(a), 1610.6).

##### *Income Ineligible Client*

A recipient may use any non-LSC funds to provide legal assistance to a financially ineligible (over-income) client, provided that the funds are used for the specific purposes for which those funds were provided and the activity is not otherwise prohibited by the LSC Act or Section 504 (45 CFR §1610.4(d)).

##### *Contributions received from Non-LSC Sources*

Except for contributions of less than \$250, no recipient may accept funds from any



source other than the Corporation, unless it provides to the source of the funds written notification of the prohibitions and conditions which apply to the funds (45 CFR §1610.5).

#### *Restrictions on Transferred Funds*

If a recipient transfers LSC funds to another person or entity, the prohibitions and requirements referred to in 45 CFR §1610 apply both to the LSC funds transferred and to the non-LSC funds of the person or entity to whom those funds are transferred, except that:

(1) As to the requirements of 45 CFR §1620 on priorities, the transferee shall either: (i) use the funds transferred consistent with the recipient's priorities; or (ii) establish their own priorities for the use of the funds transferred consistent with 45 CFR §1620.

(2) As to the requirements of 45 CFR §1635 on timekeeping, the transferee is required only to maintain records of time spent on each case or matter undertaken with the funds transferred and need not maintain such records in the form required by 45 CFR §1635.

(3) For a transfer of LSC funds to bar associations, *pro bono* programs, private attorneys or law firms, or other entities for the sole purpose of funding private attorney involvement activities (PAI) pursuant to 45 CFR §1614, the prohibitions or requirements of 45 CFR §1610 shall apply only to the funds transferred and not to the transferee's other funds (45 CFR §1610.7).

#### *Program Integrity*

A recipient must have objective integrity and independence from any organization that engages in restricted

activities. A relationship with another organization will meet this standard if:

(1) The other organization is a legally separate entity;

(2) The other organization receives no transfer of LSC funds, and LSC funds do not subsidize restricted activities; and

(3) The recipient is physically and financially separate from the other organization. Mere bookkeeping separation of LSC funds from other funds is not sufficient. Whether sufficient physical and financial separation exists will be determined on a case-by-case basis and will be based on the totality of the facts. The presence or absence of any one or more factors will not be determinative. Factors relevant to this determination shall include but will not be limited to: (i) the existence of separate personnel; (ii) the existence of separate accounting and timekeeping records; (iii) the degree of separation from facilities in which restricted activities occur, and the extent of such restricted activities; and (iv) the extent to which signs and other forms of identification which distinguish the recipient from the organization are present (45 CFR §1610.8(a)).

Each recipient's governing body must have certified to the Corporation by December 19, 1997 that the recipient is in compliance with the requirements of §1610.8(a). Thereafter, the recipient's governing body must certify such compliance to the Corporation on an annual basis (45 CFR §1610.8(b)).

Funds received by a recipient from a source other than the Corporation shall be accounted for as separate and distinct receipts and disbursements in a manner directed by the Corporation (45 CFR §1610.9).

## **Suggested Audit Procedures**

- Determine how the recipient ensures compliance with this regulation. Obtain an understanding of the internal controls in place to ensure compliance with the requirements of 45 CFR § 1610. Review policies and procedures.
- Obtain an understanding as to how the restrictions are communicated to staff and whether these are adhered to by staff. Interview recipient staff as to their knowledge concerning the possible existence of any matter that may fall under the restrictions of this regulation. Follow-up on all such possible occurrences.
- Review any leases, contracts, agreements, arrangements, understandings or relationships that the recipient, its staff or its board may have currently or had previously entered into with entities (organizations or individuals) engaged in restricted activities in order to ensure compliance with 45 CFR § 1610.8 and the respective compliance requirement in effect when these activities were undertaken. (These entities may include individual private practitioners, law firms, not-for-profit organizations, public interest groups, etc.) This review is to encompass the entire audit period. The auditor must be alert to the varying compliance requirements (summarized in Part B) existing in calendar year 1997 that affect this issue.
- Sample transactions (payments/transfers) with entities (organizations or individuals) that are known to be involved in restricted/ prohibited activities in order to ascertain that any such transactions comply with 45 CFR § 1610.
- Review the accounting system (chart of accounts, general ledger etc.) to ascertain whether it provides for a separation of receipts and disbursements of LSC and non-LSC funds in accordance with the requirements of 45 CFR § 1610.9.
- Review the method of allocating expenses between LSC and non-LSC funds to ascertain whether it ensures that non-LSC funds, except as permitted by 45 CFR § 1610, are not used for the prohibited activities as defined by 45 CFR § 1610.3.
- Inquire of appropriate personnel and review grant and contract agreements for non-LSC funds to determine whether activities that LSC restrictions permit to be undertaken with non-LSC funds (e.g., responding to requests of legislators or agency officials under Part 1612, payment of dues under Part 1627, etc.) may be undertaken with the particular non-LSC funds.

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## **1611 ELIGIBILITY**

### **LSC Regulations**

## **Compliance Requirement**

### Income level

Every recipient shall establish a maximum annual income level for persons to be eligible to receive legal assistance under the LSC Act (45 CFR § 1611.3(a)). Unless specifically authorized by LSC, a recipient shall not establish a maximum annual income level that exceeds one hundred and twenty-five percent (125 percent) of the current official Federal Poverty Income Guidelines (45 CFR § 1611.3(b)). See the Appendix to 45 CFR § 1611 for LSC's current income levels.

Recipients establish maximum annual income levels and asset ceilings for client eligibility and may not use LSC funds to represent individuals whose income exceeds the maximums unless (a) the client's gross income is under 187.5% of poverty line, (b) the asset ceiling, if exceeded, has been waived pursuant to a policy established by the recipient's governing body, and (c) the client file includes the recipient's documentation pursuant to authorized exceptions under 45 CFR § 1611.5(b)(1), or the client is seeking legal assistance to secure benefits provided by a governmental program for the poor. The recipient must keep records as to the number of over income clients served and the factual basis for each such *exception* (45 CFR §§ 1611.3, 1611.4, 1611.6) when LSC funds are used. Please note that recipients who receive Older Americans Act (OAA) funds for the representation of senior citizens, whether or not they use LSC funds for the nonfederal match, are not permitted to use a means test in determining eligibility of the seniors who are represented with OAA funds.

The governing body of a recipient shall adopt guidelines, consistent with these regulations, for determining the eligibility of persons seeking legal assistance under the LSC Act (45 CFR § 1611.5(a)). These guidelines shall be reviewed annually.

### Asset ceilings

Annually, the governing body of the recipient shall establish guidelines incorporating specific and reasonable asset ceilings, including both liquid and non-liquid assets, to be utilized in determining eligibility for services (45 CFR § 1611.6(a)). The guidelines shall consider the economy of the service area and the relative cost-of-living of low-income persons so as to ensure the availability of services to those in the greatest economic and legal need. The guidelines shall be consistent with the recipient's priorities established in accordance with 45 CFR 1620 and special consideration shall be given to the legal needs of the elderly, institutionalized, and handicapped (45 CFR § 1611.6(b)). Assets considered shall include all liquid and non-liquid assets of all persons who are resident members of a family unit, except that a recipient may exclude the principal residence of a client (45 CFR § 1611.6(c)).

### Group eligibility

LSC funds can only be used to provide legal assistance to a group that is primarily composed of persons eligible for legal assistance under the Act and that has no

practical means of obtaining funds to retain private counsel (45 CFR § 1611.5(c)).

#### Retainer Agreement

The recipient must routinely execute a retainer agreement with each client when

representation commences, unless only brief advice and consultation was provided, or the situation appeared to be an emergency and a retainer agreement was executed "as soon thereafter as is practicable" (45 CFR § 1611.8).

#### **Suggested Audit Procedures**

- Obtain an understanding of the recipient's policies and procedures for ensuring compliance with 45 CFR §§ 1611.3, 1611.4, 1611.5 and 1611.6.
- Determine if the recipient has established a maximum annual income level, not in excess of 125% of the current official Federal Poverty Income Guidelines, for persons to be eligible to receive legal assistance under the LSC Act.
- Review the recipient's eligibility guidelines to ascertain whether it incorporates asset ceilings pursuant to 45 CFR § 1611.6(a).
- Review the recipient's policies or procedures relating to determination of group eligibility to ascertain whether they are consistent with 45 CFR § 1611.5(c).
- Review board minutes and resolutions to determine if the recipient's board of directors has adopted eligibility guidelines for determining the eligibility of persons seeking legal assistance under the LSC Act and whether these guidelines are consistent with provisions of the regulation in accordance with 45 CFR § 1611.5(a).
- Determine whether intake and case acceptance policies and procedures are in place to ensure that the clients served with LSC funds are eligible in accordance with the requirements of 45 CFR § 1611.
  - a. Interview appropriate recipient staff responsible for the client intake process and eligibility determination;
  - b. Perform tests to ascertain if the recipient's records/database includes all the clients receiving services during the audit period; and
  - c. Select a sample of clients (intake records) receiving services and perform tests to ascertain if the specific individuals were eligible in accordance with the compliance requirements.
- Review recipient records as to the number of clients whose income exceeded 125% of the poverty line and were authorized to be served by the recipient with LSC funds and the factual basis for each such authorization in compliance with 45 CFR § 1611.4(b). Review a sample

of files of over income clients served to determine whether the factual basis for each authorization is documented and is consistent with the authorized exceptions identified in the regulation.

- Ascertain whether the recipient routinely executes a retainer agreement for each client when representation commences, except when the only service to be provided is brief advice and consultation or an emergency situation.
- Review a sample of case files and determine adherence to the prescribed system. This review shall include the following components:
  - a) Assess the type of case/matter for allowability under the LSC Act and regulations and LSC's FY 1996 appropriations act, Public Law 104-134, 110 Stat. 1321 (1996).
  - b) Examine case files for eligibility forms and signed retainer agreements.
  - c) Review eligibility determinations to assess whether the client's reported income level was within the maximum income levels established by the recipient.
  - d) If the client's reported income level exceeded the maximum income level, determine whether the assistance provided the client was supported by non-LSC funds (45 CFR § 1611.3(e)). If LSC funds were used and the client's gross income exceeded the maximum income level, but did not exceed 187.5% of the poverty line, establish that the recipient made the determination that eligibility should be allowed on the basis of one or more factors set forth in 45 CFR § 1611.5(b)(1); **or** the client was seeking assistance to secure benefits provided by a governmental program for the poor (45 CFR § 1611.4(a)(1) and (2)); **and** the program maintained documentation supporting the decision and the factual bases for the decision (45 CFR § 1611.4(b)).

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## **\*1612 RESTRICTIONS ON LOBBYING AND CERTAIN OTHER ACTIVITIES**

### **LSC Regulations**

45 CFR §§ 1612.2, 1612.3, 1612.4, 1612.5, 1612.6, 1612.7, 1612.8, 1612.9, 1612.10, 1612.11

### **Compliance Requirement**

Except as noted below, after April 25 1996, recipients shall not attempt to influence:  
(1) the passage or defeat of any legislation or constitutional amendment; (2) any initiative, or

any referendum or any similar procedure of the Congress, any State legislature, any local council, or any similar governing body acting in any legislative capacity; (3) any provision in

a legislative measure appropriating funds to, or defining or limiting the functions or authority of, the recipient or LSC; (4) the conduct of oversight proceedings concerning the recipient or LSC; (5) the issuance, amendment or revocation of any executive order; (6) or participate in any rulemaking as defined in § 1612.2(d)(1). Recipients shall not use any funds to pay for any personal service, advertisement, telegram, telephone communication, letter, printed or written matter, administrative expense, or related expense, associated with an activity prohibited in (1)--(6) detailed above (45 CFR § 1612.3).

Recipients shall not engage in any grassroots lobbying activity as defined in 45 CFR § 1612.2(a)(1) (45 CFR § 1612.4).

Recipients and their employees may use non-LSC funds to respond to a written request from a governmental agency or official thereof, elected official, legislative body, committee, or member thereof made to the employee, or to a recipient to: (1) testify orally or in writing; (2) provide information which may include analysis of or comments upon existing or proposed rules, regulations or legislation, or drafts of proposed rules, regulations or legislation; (3) testify before or make information available to commissions, committees or advisory bodies; or (4) participate in negotiated rulemaking under the Negotiated Rulemaking Act of 1990, 5 U.S.C. §561, *et seq.*, or comparable State or local laws (45 CFR § 1612.6(a)). Communications made in response to these requests may be distributed only to the party or parties that make the request or to other persons or entities only to the extent that such distribution is required to comply with the request (45 CFR § 1612.6(b)). The request from any official to testify or otherwise provide

information in connection with legislation or rulemaking may not be solicited or arranged by an employee of the recipient (45 CFR § 1612.6(c)).

Recipients may use non-LSC funds (1) to provide oral or written comment to an agency and its staff in a public rulemaking proceeding (2) to contact or communicate with, or respond to a request from a state or local government agency, a state or local legislative body or committee, or a member thereof, regarding funding for the recipient, including a pending or proposed legislative or agency proposal to fund such recipient (45 CFR §§1612.6(e), 1612.6(f)).

No person shall during working hours, while providing legal assistance or representation to the recipient's clients or while using recipient resources provided by the Corporation, participate in any public demonstration, picketing, boycott, or strike, except as permitted by law in connection with the employee's own employment situation or encourage, direct, or coerce others to engage in such activities. No employee of a recipient shall at any time engage in or encourage others to engage in any (1) rioting or civil disturbance; (2) activity determined by a court to be in violation of an outstanding injunction of any court of competent jurisdiction; or (3) other illegal activity that is inconsistent with an employee's responsibilities under applicable law, LSC regulations, or the rules of professional responsibility of the jurisdiction where the recipient is located or the employee practices law (45 CFR § 1612.7).

A recipient may not support or conduct training programs that: (1) advocate particular public policies; (2) encourage or facilitate political activities, labor or anti-labor activities,

boycotts, picketing, strikes or demonstrations, or the development of strategies to influence legislation or rulemaking; (3) disseminate information about such policies or activities; or (4) train participants to engage in activities prohibited by the LSC Act, other applicable law, or Corporation regulations, guidelines or instructions. A recipient is not prohibited from training attorneys or paralegals, clients, lay advocates, or others involved in the representation of eligible clients necessary for preparing them: (1) to provide adequate legal assistance to eligible clients; or (2) to provide advice to any eligible client as to the legal rights of the client ( 45 CFR § 1612.8).

No funds made available by LSC or by private entities may be used to initiate the formation, or to act as an organizer, of any association, federation, labor union, coalition, network, alliance, or any similar entity (45 CFR § 1612.9(a)). This provision does not apply to organizations composed exclusively of eligible clients formed for the purpose of advising a legal services program about the delivery of legal services. Recipients may provide legal assistance to eligible clients who desire to set up organizations, such as by preparing articles of incorporation and bylaws.

A recipient may initiate or participate in litigation challenging agency rules,

regulations, guidelines or policies, unless such litigation is otherwise prohibited by law or LSC regulations (45 CFR § 1612.5(b)).

The following requirements apply to legislative and rulemaking activities under 45 CFR 1612.6: (1) Recipients shall maintain copies of all written requests received by the recipient and written responses made in response thereto and make such requests and written responses available to monitors and other representatives of the Corporation upon request; (2) no funds made available by the Corporation shall be used to pay for administrative overhead or related costs associated with any activity listed in §1612.6; (3) recipients shall maintain separate records documenting the expenditure of non-LSC funds for legislative and rulemaking activities permitted by §1612.6; and (4) recipients shall submit semi-annual reports describing their legislative activities with non-LSC funds conducted pursuant to §1612.6, together with such supporting documentation as specified by the Corporation (45 CFR §§1612.6(d), 1612.10(a), 1612.10(b), 1612.10(c)).

Recipients must have written policies and procedures to guide their staff in complying with this part (45 CFR § 1612.11).

### **Suggested Audit Procedures**

- Determine that policies and procedures are in place to ensure that the recipient does not undertake an activity in violation of 45 CFR § 1612.
- Determine how the recipient ensures that the policies/procedures are effectively communicated to staff and that these procedures are followed in practice by staff. Interview recipient staff as to their knowledge concerning the possible existence of any matter that may fall under the requirements of this regulation. Follow up on all such possible occurrences.

- Verify whether the recipient maintains separate records documenting the expenditure of non-LSC funds for legislative and rulemaking activities permitted by 45 CFR § 1612.6.
- Test expenditures for allowability pursuant to Part 1612. Evaluate supporting documentation and cost allocation methods for adequate recordkeeping and accuracy of the amounts reported.
- Review the recipient's semi-annual reports together with supporting documentation and determine whether the reported activities comply with the regulation.
- Review a sample of permissible activities conducted by the recipient using any funds (45 CFR § 1612.5) and those using non-LSC funds (45 CFR § 1612.6), including the recordkeeping system in place, in order to determine compliance with the respective provisions. (Auditors should review the documentation required pursuant to 45 CFR § 1612.10(b) for permitted activities with non-LSC funds.)
- In assessing compliance with 45 CFR § 1612.4, interview appropriate staff as to whether the recipient engaged in any grassroots lobbying.
- Interview appropriate staff as to whether any person, while employed under the Act and while using resources provided by LSC or private entities (either directly or through a subrecipient), participated in public demonstrations or engaged in specific activities detailed under 45 CFR § 1612.7.
- Interview appropriate staff as to whether the recipient conducted or supported training for staff attorneys and paralegals in accordance with 45 CFR § 1612.8.

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## **1613 RESTRICTIONS ON LEGAL ASSISTANCE WITH RESPECT TO CRIMINAL PROCEEDINGS**

### **LSC Regulations**

45 CFR §§ 1613.3 and 1613.4

### **Compliance Requirement**

LSC funds shall not be used to provide legal assistance with respect to a criminal proceeding unless authorized by this regulation (45 CFR § 1613.3).

Legal assistance may be provided with respect to a criminal proceeding under the following circumstances: (a) pursuant to a court appointment made under a statute or a court rule or practice of equal applicability to



all attorneys in the jurisdiction, if authorized by the recipient after a determination that it is consistent with the recipient's primary responsibility to provide legal assistance to eligible clients in civil matters; or (b) when professional responsibility requires representation in a criminal proceeding arising out of a transaction with respect to which the client is being, or has been, represented by a recipient (45 CFR § 1613.4).

Recipients are permitted to use public funds under certain circumstances for criminal representation and are permitted to use private funds for criminal representation provided under a separately funded public defender program or project. They are also permitted to undertake court appointments in criminal cases and to use non-LSC funds for the representation (45 CFR § 1610.6).

### **Suggested Audit Procedures**

- Obtain an understanding of the policies, practices and internal controls in place to ensure compliance with the requirements of 45 CFR § 1613.
- Determine how the recipient ensures that the restrictions are effectively communicated to staff and that these procedures are followed in practice by staff. Interview recipient staff as to their knowledge concerning the possible existence of any attorney representation of a client that may be prohibited by this regulation. Follow up on all such possible occurrences.

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## **1614 PRIVATE ATTORNEY INVOLVEMENT (PAI)**

### **LSC Regulations**

45 CFR §§ 1614.1, 1614.3 and 1614.5

### **Compliance Requirement**

A recipient of LSC funding is required to devote an amount of LSC and/or non-LSC funds equal to at least 12.5% of the recipient's LSC annualized basic field award for the involvement of private attorneys in the delivery of legal assistance to eligible clients. The recipient is to demonstrate compliance with this Part by using financial systems and procedures and maintaining supporting documentation to identify and account separately for costs related to the PAI effort.

Activities undertaken by the recipient to meet the requirements of this part must include the direct delivery of legal assistance to eligible clients through programs such as organized pro bono plans, reduced fee plans, judicare panels, private attorney contracts, or modified pro bono plans which provide for the payment of nominal fees by eligible clients and/or organized referral systems (45 CFR § 1614.3(a)).

The specific methods to be undertaken by a recipient to involve private attorneys in the provision of legal assistance to eligible clients are to be determined by the recipients taking into account the following factors: (1) the priorities established pursuant to Part 1620; (2) the effective and economic delivery of legal assistance to eligible clients; (3) the linguistic and cultural barriers to effective advocacy; (4) the actual or potential conflicts of interest between specific participating attorneys and individual eligible clients; and (5) the substantive and practical expertise, skills, and willingness to undertake new or unique areas of the law of participating attorneys (45 CFR § 1614.3(c)).

Systems designed to provide direct services to eligible clients by private attorneys on either a pro bono or reduced fee basis, shall include at a minimum, the following components: (1) intake and case acceptance procedures consistent with the recipient's established priorities in meeting the legal needs of eligible clients; (2) case assignments which ensure the referral of cases according to the nature of the legal problems involved and the

skills, expertise, and substantive experience of the participating attorney; (3) case oversight and follow-up procedures to ensure the timely disposition of cases to achieve, if possible, the result desired by the client and the efficient and economical utilization of recipient resources; and (4) access by private attorneys to LSC recipient resources (45 CFR § 1614.3(d)).

The recipient shall develop a plan and budget to meet the requirements of this regulation which shall be incorporated as part of the refunding application or initial grant application (45 CFR § 1614.4(a)). The recipient shall consult with significant segments of the client community, private attorneys, and bar associations, in the recipient's service area in the development of its annual plan to provide for the involvement of private attorneys in the provision of legal assistance to eligible clients and shall document that each year its proposed annual plan has been presented to all local bar associations within the recipient's service area and shall summarize their response (45 CFR § 1614.4(b)).

### **Suggested Audit Procedures**

- Obtain an understanding of the policies and procedures in place to ensure that cost allocated to PAI meet the requirements of 45 CFR § 1614.3(e).
- Review the accounting systems and procedures used to identify and account separately for costs related to the PAI effort in order to determine their consistency with 45 CFR § 1614.3(e). Verify that any applicable supplementary schedules to the audited financial statements reflect proper separate reporting of PAI expenses.
- Review records of PAI expenses. Assess whether the recipient has satisfied the 12.5 % requirement for PAI expenditures.

- Review and test support for PAI allocations to ensure that recordkeeping requirements are met.
- Determine compliance with 45 CFR § 1614.3 by reviewing the recipient's PAI activities and interviewing the intake staff (or other appropriate staff, such as the PAI coordinator) regarding the referral process to private attorneys.
- Obtain from the recipient the list of private attorneys who have received compensation for cases during the review period. Contact a sample of private attorneys to confirm that the compensated cases were allowable under 110 Stat. 1321 (1996).

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## **1615 RESTRICTIONS ON ACTIONS COLLATERALLY ATTACKING CRIMINAL CONVICTIONS**

### **LSC Regulations**

45 CFR §§ 1615.2 and 1615.3

### **Compliance Requirement**

LSC funds shall not be used to provide legal assistance in an action in the nature of habeas corpus collaterally attacking a criminal conviction if the action (a) is brought against an officer of a court, a law enforcement official, or a custodian of an institution for persons convicted of crimes; and (b) alleges that the conviction is invalid because of any alleged acts or failures to act by an officer of a court or a law enforcement official (45 CFR § 1615.2).

This regulation does not prohibit legal assistance: (a) to challenge a conviction resulting from a criminal proceeding in which

the defendant received representation from a recipient pursuant to LSC regulations; or (b) pursuant to a court appointment made under a statute or a court rule or practice of equal applicability to all attorneys in the jurisdiction, if authorized by the recipient after a determination that it is consistent with the recipient's primary responsibility to provide legal assistance to eligible clients in civil matters (45 CFR § 1615.3).

See discussion under summary Part 1613 regarding use of non-LSC funds.

### **Suggested Audit Procedures**

- Obtain an understanding of the policies, practices and internal controls in place to ensure compliance with the requirements of 45 CFR § 1615.
- Determine how the recipient ensures that the restrictions are effectively communicated to staff and whether these procedures are followed in practice by staff. Interview a sample of recipient staff as to their knowledge concerning the possible existence of any representation of a client that may be prohibited by this regulation. Follow up on all such possible occurrences. If such matters have been handled by the recipient, determine whether LSC funds were used to support these activities.

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## **\*1617 CLASS ACTIONS**

### **LSC Regulations**

45 CFR §§ 1617.2, 1617.3, 1617.4

### **Compliance Requirement**

After April 25, 1996, recipients are prohibited from using any funds to initiate or participate in any class action at any stage, other than (1) non-adversarial activities including efforts to remain informed about, to explain, clarify, educate or advise others about the terms of an order granting relief, (2) representation of individual clients seeking to opt out from a class, or (3) individual representation of a client seeking to obtain the benefit of relief ordered by the court.<sup>5</sup> A class action is any lawsuit filed pursuant to Rule 23 of the Federal Rules of Civil Procedure or

comparable State statute or rule of civil procedure applicable in the court in which the action is filed (45 CFR § § 1617.2, 1617.3). The definition of a class action does not include a mandamus action or injunctive or declaratory relief actions, unless such actions are filed or certified as class actions.

Recipients must have written policies and procedures to guide their staff in ensuring compliance with this rule (45 CFR § 1617.4).

### **Suggested Audit Procedures**

- Obtain an understanding of the recipient's written policies and procedures for ensuring compliance with 45 CFR § 1617 and ascertain whether such policies and procedures are consistent with the provisions of the regulation.
- Determine how the recipient ensures that the policies and procedures are communicated to staff and whether these procedures are followed in practice by staff. Interview a sample of recipient staff as to their knowledge concerning the possible existence of any matter falling under the prohibition. Follow up on all such possible occurrences.
- Review recipient documentation, including the mandatory LSC submissions (i.e., reporting forms CO-1 Class actions or CO-4 Certification form), evidencing case divestiture pursuant to Section 508(b) of 110 Stat. 1321 (1996) in order to assess any ongoing representation in cases reported. Be alert for continuing involvement in prohibited case activity reported by the recipient to LSC as having been fully divested.
  - a. Inquire of class action cases retained by the recipient pursuant to the exceptions identified in the compliance requirement detailed above. Ascertain the type of activity undertaken on these cases and the related time expended on these cases. Evaluate whether

the activities engaged in complied with 45 CFR § 1617.3. (Recipients may continue to participate in class actions filed prior to April 26, 1996, for the limited purpose of seeking attorneys' fees for recipient activity conducted in those cases prior to August 1, 1996.)

b. Review timekeeping records for any time spent during the audit period on reported cases. Follow up to determine compliance with the regulation.

- In conjunction with the review of case files, and including discussions with the appropriate casehandler, ascertain compliance with 45 CFR § 1617.

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## **\*1620 PRIORITIES IN USE OF RESOURCES**

### **LSC Regulations**

45 CFR §§ 1620.3, 1620.4, 1620.5, 1620.6, 1620.7

### **Compliance Requirement**

The recipient's governing body must adopt procedures for establishing priorities for the use of all its LSC and non-LSC resources and must adopt a written statement of priorities, pursuant to those procedures, that determines the cases and matters which are to be undertaken by the recipient (45 CFR § 1620.3(a)). The recipient's governing body must have adopted written policies and procedures for undertaking emergency cases or matters (as defined in § 1620.4) that are not within the recipient's priorities (45 CFR § 1620.4).

All staff who handle cases or matters, or make decisions about case acceptance, must have signed a simple agreement, developed by the recipient, indicating that the signatory: (a) has read and understands the priorities established by the recipient's governing body; (b) has read and understands the definition of an emergency situation and the recipient's procedures for dealing with an emergency that falls outside of the recipient's priorities; and

(c) will not undertake any case or matter for the recipient that is not a priority or an emergency (45 CFR § 1620.6).

The recipient must periodically set priorities and its governing body must annually review the priorities or more frequently if the recipient has accepted a significant number of emergency cases (45 CFR § 1620.5(a)). The recipient must report to its governing body quarterly and to LSC annually information on all emergency cases or matters undertaken by the recipient that were not within the recipient's priorities (45 CFR §§ 1620.7(a) and (b)).

The recipient must submit to LSC and make available to the public an annual report summarizing the review of priorities; the date of the most recent appraisal; the timetable for the future appraisal of needs and evaluation of priorities; mechanisms which will be utilized to ensure effective client participation in priority-

setting; and any changes in priorities (45 CFR § 1620.7(c)).

### **Suggested Audit Procedures**

- Review activity of the recipient's governing body to determine if it has adopted procedures for establishing priorities in the use of recipient resources and whether it has adopted a written statement of priorities that determines the cases and matters to be undertaken by the recipient.
- Review activity of the recipient's governing body to determine if it has adopted procedures for undertaking emergency cases or matters not within the recipient's established priorities pursuant to 45 CFR § 1620.4.
- Review the minutes of board meetings to determine whether priorities are set periodically and reviewed by the governing body of the recipient at least annually. (Note that a recipient may maintain separate priorities for each office or for a particular segment of the service area.)
- Determine how the recipient ensures that the policy and procedures are effectively communicated to staff and whether these procedures are followed in practice by staff. Interview recipient staff responsible for the client intake process as to their knowledge of recipient priorities. Identify all staff who handle cases or matters or make decisions about case acceptance and review their signed written agreements not to undertake non-priority cases or matters except for those that are emergencies, in accordance with 45 CFR § 1620.6.
- In conjunction with the review of case files, determine whether the subject matter of these cases falls within the written priorities of the recipient. This determination shall be limited to cases undertaken after the date when the recipient adopted new written priorities pursuant to the requirements of interim regulation Part 1620, or after September 28, 1996, whichever is earlier.
- Review a sample of program activities falling within the category of "matters" to determine whether the activity falls within the written priorities of the recipient. For purposes of assessing compliance with Part 1620, this review shall be limited to matters undertaken after the date when the recipient adopted new written priorities pursuant to the requirements of interim regulation Part 1620, or after September 28, 1996, whichever is earlier.
- Review the annual report to determine if it contains the provisions required by 45 CFR § 1620.7(c).

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### **\*1626 RESTRICTIONS ON LEGAL ASSISTANCE TO ALIENS**

## **LSC Regulations**

45 CFR §§ 1626.2, 1626.3, 1626.4, 1626.5, 1626.7, 1626.8, 1626.9, 1626.10, 1626.11, and 1626.12

### **Compliance Requirement**

After April 25, 1996, a recipient may not use any funds to provide legal services for or on behalf of an ineligible alien beyond normal intake and referral services, except for use of non-LSC funds to represent ineligible aliens who are battered or subjected to extreme cruelty (45 CFR §§ 1626.3, 1626.4, 1626.5). Alien status and eligibility are defined at 45 CFR §1626.5.

Except when the only service is brief advice and telephone consultation, a citizen seeking representation must attest in writing in an LSC approved form to the fact of his or her United States citizenship (45 CFR §1626.6(a)). Verification of citizenship shall not be required unless a recipient has reason to doubt that a person is a United States citizen (45 CFR §1626.6(b)). Factors such as accent, race or national origin may not be considered as a reason to doubt citizenship.

Except when the only service is brief advice and telephone consultation, an alien seeking representation must submit appropriate documents, including but not limited to those listed in the Appendix to 45 CFR 1626, to verify eligibility. In an emergency, legal services may be provided prior to compliance with all the requirements of §1626.6 for a citizen or §1626.7 for an alien if the requirements of §1626.8 are satisfied.

Recipients must have written policies and procedures to guide their staff in complying with this part and shall maintain records sufficient to document the recipient's compliance with this part (45 CFR § 1626.12).

Recipients may provide criminal and related representation to ineligible aliens in court appointments or as part of a separately funded public defender project or program.

### **Suggested Audit Procedures**

- Obtain an understanding of the written policies, procedures and recordkeeping in place to ensure compliance with the requirements of 45 CFR § 1626 and ascertain whether the recipient's written policies and procedures are consistent with the provisions of the regulation.
- Determine how the recipient ensures that the policies and procedures are communicated to staff and whether these procedures are followed in practice by staff. Interview a sample of recipient staff as to their knowledge concerning the possible existence of any matter falling under the restrictions. Follow up on all such possible occurrences.
- Review recipient documentation, including the mandatory LSC submissions (i.e., reporting forms CO-2 Aliens or CO-4 Certification form), evidencing case divestiture pursuant to Section 508(b) of 110 Stat. 1321 (1996) in order to assess any ongoing representation. Be



alert for continuing involvement in prohibited case activity reported by the recipient to LSC as having been fully divested.

- In conjunction with the review of case files, inspect the citizenship attestation statement signed by the client (or, if applicable, the recipient's documentation of eligible alien status) contained in the case file to determine compliance with 45 CFR § 1626.6.

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## **\*1627 SUBGRANTS AND DUES**

### **LSC Regulations**

45 CFR §§ 1627.2, 1627.3, 1627.4, 1627.6, 1627.8

### **Compliance Requirement**

LSC funds may not be transferred to another entity for the purpose of conducting any of the recipient's programmatic activities without prior LSC approval of a subgrant, unless the transfer is an amount less than \$25,000 paid to a private attorney or law firm for the provision of legal assistance to eligible clients, or is an amount paid for the provision of goods and services by vendors, consultants, or professionals (45 CFR § 1627.2).

With regard to subgrants of LSC funds, recipients must ensure that subrecipient(s) comply with the financial and audit requirements of LSC, specifically including those regarding the proper expenditure of, accounting for, and audit of, delegated funds (45 CFR § 1627.3(c)). Funds of a subrecipient remaining at the end of the grant period must be included in the recipient's fund balance (45 CFR § 1627.3(b)(1)). The requirements of § 1627.3 also apply to all

subgrants by one recipient to another recipient (45 CFR § 1627.6(a)).

After April 25, 1996, recipients may not use Corporation funds to pay dues to any private or nonprofit organization other than dues mandated as a requirement of practicing a profession by a governmental organization, but non-LSC funds may be used to pay such dues (45 C.F.R. §1627.4).

Recipients may not make any contributions or gifts of LSC funds to another organization or to an individual (45 CFR § 1627.5).

Recipients must have written policies and procedures to guide their staff in complying with this part and shall maintain records sufficient to document the recipient's compliance with this part (45 CFR § 1627.8).

## **Suggested Audit Procedures**

- Obtain an understanding of the written policies, procedures and recordkeeping in place for ensuring compliance with this regulation and for ensuring that subrecipients comply with the LSC Act, regulations, grant agreements and subgrant agreements.
  - Identify all subgrants using LSC funds and determine if prior written approval for the subgrants was obtained from LSC.
  - Discuss subrecipient oversight with the recipient's staff to gain an understanding of the scope of these activities, including the number, size, and complexity of awards to subrecipients.
  - Review the recipient's documentation of subrecipient oversight to ascertain if the recipient ensured that subrecipients used LSC funds for authorized purposes and in accordance with subgrant agreements.
  - Determine whether LSC funds transferred to organizations or private attorneys comply with the requirements of 45 CFR § 1627.
  - Determine whether LSC funds were used to pay dues or contributions in violation of 45 CFR §§ 1627.4 and 1627.5 by testing expenditures for payments made with LSC funds.
  - Verify whether LSC funds received by the recipient from another recipient were properly accounted for in accordance with the requirements of 45 CFR § 1627.6.
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## **1628 RECIPIENT FUND BALANCES**

### **LSC Regulations**

45 CFR §§ 1628.1, 1628.2(a), 1628.3, 1628.4(c) and (e), and 1628.5(a) and (c)

### **Compliance Requirement**

Without prior Corporation approval, a recipient may not use LSC funds to liquidate a deficit in the LSC fund from a prior year (45 CFR § 1628.5).

Without prior Corporation approval, a recipient may not expend LSC funds carried over from one year to the next in excess of

10% of LSC "support." For these purposes, Corporation "support" includes annualized Corporation grant awards plus additional income (a) derived from a Corporation grant, such as interest and rents, and (b) the proportion attributable to any LSC grant of any reimbursement or recovery of direct payments to attorneys, proceeds from the sale

of assets or other compensation or income (45 CFR § 1628.2(a)).

### **Suggested Audit Procedures**

- Calculate the recipient's prior year-end LSC fund balance and determine if the amount exceeded 10% of its annualized support (as defined in 45 CFR §1628.2(a)). If so, determine if the recipient requested and received a waiver for the 10% ceiling or repaid LSC the fund balance amount in excess of 10% if no waiver was received.
- Verify that income derived from an LSC grant (including interest and rents), and the proportion attributable to any LSC grant of any reimbursement or recovery of direct payments to attorneys, proceeds from the sale of assets or other compensation or income has been properly allocated to the LSC fund as support.
- Determine whether excess fund balance amounts approved by LSC for carryover were expended in accordance with the waiver granted.
- Ensure that the excess fund balance amount approved for expenditure is separately reported in the current year audited financial statements.
- Determine that LSC one-time grants have been accounted for separately as required by 45 CFR §1628.3(e). Test expenditures associated with LSC one-time grants and evaluate whether the expenditures were consistent with the purpose for which the funds were granted.

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## **1630 COST STANDARDS AND PROCEDURES**

### **LSC Regulations**

45 CFR 1630

### **Compliance Requirement**

The Corporation's cost principles provide that LSC funds may not be charged for any costs which do not serve LSC cost objectives. The LSC Act, the annual appropriations acts, and the Corporation's rules, regulations, and guidelines, including the 1997 Accounting Guide for LSC Recipients, establish the relevant cost principles for testing

compliance under this Compliance Supplement.

Unless prior approval has been obtained from the Corporation, no LSC funds may be used for: (1) payment of more than \$10,000 to purchase, or any payments to lease equipment, furniture, books or similar personal property if the single item or combined

purchase price or value of the items purchased or leased is in excess of \$10,000; (2) purchase of real property; (3) consultant contracts in excess of \$5,000 or consultant fees in excess of \$261 per eight hour day or \$35 per hour. For this purpose, consultant services do not

include the retention of expert witnesses or attorneys or other consultants secured on behalf of eligible clients, or audit services (but the preparation of interim financial reports or tax reports is considered consultant services). See 45 CFR §1630.5(b).

### **Suggested Audit Procedures**

- Obtain an understanding of the policies, practices and internal controls in place to ensure that costs charged to the LSC grant, and activities undertaken with non-LSC funds, are allowable pursuant to the LSC Act and regulations. Test a sample of transactions for conformance with the criteria under §1630 (listed in Part A) including:
    - a. Costs approved by LSC, if necessary;
    - b. Costs conform with the allowability of costs provisions pursuant to applicable cost principles or limitations contained in the LSC grant award, LSC regulations or LSC statutory provisions;
    - c. Costs represent charges for actual costs, not budgeted or projected amounts;
    - d. Costs are given consistent accounting treatment within and between accounting periods;
    - e. Costs calculated in conformity with generally accepted accounting principles; and
    - f. Costs are supported by appropriate documentation (such as approved purchase orders, receiving reports, vendor invoices, canceled checks, and time records) and correctly charged as to account, amount, and period.
  - Confirm that prior approval by LSC had been obtained for the use of LSC funds for the lease or purchase of equipment, furniture, books or similar personal property in excess of \$10,000. (45 CFR § 1630.5).
  - Confirm that prior approval by LSC had been obtained for the use of LSC funds for the purchase of real property. (45 CFR § 1630.5).
  - Confirm that prior approval by LSC had been obtained for the use of LSC funds for consultant contracts in excess of \$5,000 (45 CFR § 1630.5) and private attorney contracts in excess of \$25,000 (45 CFR § 1627.2(b)(1)).
  - Confirm that prior approval by LSC had been obtained for the use of LSC funds for consultant fees in excess of \$261 per day or \$35 per hour except for retention of expert witnesses and other consultants or attorneys secured on behalf of eligible clients or audit services. (45 CFR § 1630.5).
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## **\*1632 REDISTRICTING**

### **LSC Regulations**

45 CFR §§ 1632.2, 1632.3, 1632.4

#### **Compliance Requirement**

After April 25, 1996, recipients shall not make available any funds, personnel, or equipment for use in advocating or opposing any plan or proposal, or represent any party or participate in any other way in litigation related to redistricting.<sup>6</sup> This does not prohibit any litigation brought by a recipient under the Voting Rights Act of 1965, as amended, 42

U.S.C. 1971 et seq., provided such litigation does not involve redistricting (45 CFR §§ 1632.2, 1632.3).

Recipients must have written policies to implement the requirements of this part (45 CFR § 1632.4).

#### **Suggested Audit Procedures**

- Obtain an understanding of the written policies in place to ensure compliance with the requirements of 45 CFR § 1632 and ascertain whether the recipient's policies are consistent with the provisions of the regulation.
- Determine how the recipient ensures that the policies are effectively communicated to staff. Interview recipient staff as to their knowledge concerning the possible existence of any matter falling under the restrictions of this regulation. Follow-up on all such possible occurrences.

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## **\*1633 RESTRICTION ON REPRESENTATION IN CERTAIN EVICTION PROCEEDINGS**

### **LSC Regulations**

45 CFR §§ 1633.2, 1633.3, 1633.4

#### **Compliance Requirement**

After April 25, 1996, recipients may not defend any person in a proceeding to evict that person from a public housing project if: (a) the person has been charged with or has been convicted of the illegal sale, distribution,

or manufacture of a controlled substance, or possession of a controlled substance (as defined in §102 of the Controlled Substances Act (21 U.S.C. §802)) with the intent to sell or distribute; and (b) the eviction proceeding is

brought by a public housing agency on the basis that the illegal drug activity for which the person has been charged or for which the person has been convicted threatens the health or safety of other tenants residing in the public housing project or employees of the public housing agency (45 CFR §§1633.2, 1633.3).

Recipients must have written policies and procedures to guide their staff in complying with this part and shall maintain records sufficient to document the recipient's compliance with this part (45 CFR § 1633.4).

### **Suggested Audit Procedures**

- Obtain an understanding of the written policies, procedures and recordkeeping in place to ensure compliance with this regulation and ascertain whether the recipient's written policies and procedures are consistent with the provisions of this regulation.
- Determine how the recipient ensures that the written policies and procedures are effectively communicated to staff and whether these procedures are followed in practice by staff. Interview a sample of recipient staff as to their knowledge concerning the possible existence of any matter falling under the prohibition of this section. Follow-up on all such possible occurrences.
- In conjunction with the review of case files, and including discussions with the appropriate casehandler, ascertain compliance with 45 CFR § 1633.

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[Note: Legal Services Corporation Timekeeping Guide (April, 1996) has been prepared for LSC recipients.]

## **\*1635 TIMEKEEPING REQUIREMENT**

### **LSC Regulations**

45 CFR §§ 1635.1, 1635.2 and 1635.3

### **Compliance Requirement**

All recipients of LSC funds are required to account for the time spent on all cases, matters, and supporting activities by their attorneys and paralegals, whether funded by LSC or by other sources.

As used in this part, 45 CFR § 1635.2 provides the following definitions: (a) A "case" is a form of program service in which an attorney or paralegal of a recipient provides legal services to one or more specific clients, including, without limitation, providing representation in litigation, administrative

proceedings, and negotiations, and such actions as advice, providing brief services and transactional assistance, and assistance with individual PAI cases. (b) A "matter" is an action which contributes to the overall delivery of program services but does not involve direct legal advice to or legal representation of one or more specific clients. Examples of matters include both direct services, such as community education presentations, operating pro se clinics, providing information about the availability of legal assistance, and developing written materials explaining legal rights and responsibilities; and indirect services, such as training, continuing legal education, general supervision of program services, preparing and disseminating desk manuals, PAI recruitment, intake when no case is undertaken, and tracking substantive law developments. (c) A "supporting activity" is any action that is not a case or matter, including management and general, and fundraising.

All expenditures of funds for recipient actions are, by definition, for cases, matters, or supporting activities. The allocation of all expenditures must be carried out in accordance with 45 CFR Part 1630 ( 45 CFR § 1635.3(a)).

Time spent by attorneys and paralegals must be documented by time records which record the amount of time spent on each case, matter, or supporting activity (45 CFR § 1635.3(b)). Time records must be created contemporaneously and account for time in increments not greater than one-quarter of an hour which comprise all of the efforts of the attorneys and paralegals for which compensation is paid (45 CFR § 1635.3(b)(1)). Each record of time spent must contain: for a case, a unique client name or case number; for matters or supporting activities, an identification of the category of action on which the time was spent ( 45 CFR § 1635.3(b)(2)).

The timekeeping system must have been implemented by May 31, 1996 or within 30 days of the effective date of a grant or contract, whichever is later ( 45 CFR § 1635.3(c)).

The timekeeping system must be able to aggregate time record information from the time of implementation on both closed and pending cases by legal problem type ( 45 CFR § 1635.3(d)).

### **Suggested Audit Procedures**

- Obtain an understanding of the recipient's timekeeping system in place to ensure compliance with the timekeeping requirements of this regulation. Interview both the executive director and the individual responsible for maintaining and tracking the timekeeping system.
- Determine how the recipient ensures that the timekeeping requirements are effectively communicated to staff and whether these requirements are followed in practice by staff. Interview a sample of recipient staff and review a sample of management's and staff's timesheets to assess compliance with the program's policy and this regulation.

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## **\*1636 CLIENT IDENTITY AND STATEMENT OF FACTS**

### **LSC Regulations**

45 CFR §§ 1636.2, 1636.3, 1636.5

### **Compliance Requirement**

For cases undertaken after April 25, 1996, the recipient must, prior to the initiation of litigation or settlement negotiations, prepare for each case in which it files a complaint in a court of law or institutes or participates in litigation against a defendant, or engages in pre-complaint settlement negotiations where the filing of a suit has been authorized by the plaintiff if negotiations fail, a dated written statement (in English and, if necessary, in another language which the plaintiff understands) signed by each plaintiff, enumerating the particular facts known to the plaintiff supporting the complaint. The recipient must identify each plaintiff by name in any complaint filed (or in a separate notice provided to the defendant against whom the complaint is filed where disclosure in the complaint would be contrary to law or court rules or practice) and identify each plaintiff it represents to prospective defendants in pre-litigation settlement negotiations, unless a court of competent jurisdiction has entered an order protecting the client from such disclosure based on a finding, after notice and an opportunity for a hearing on the matter, of

probable, serious harm to the plaintiff if the disclosure is not prevented (45 CFR §1636.2).

In the event of an emergency, where the recipient reasonably believes that delay is likely to cause harm to a significant safety, property or liberty interest of the client, the recipient may proceed with the litigation or negotiation without a signed statement of fact, provided that the statement is signed as soon as possible thereafter (45 CFR § 1636.2(c)).

Written statements of fact prepared in accordance with this part are to be kept on file by the recipient (45 CFR § 1636.3(a)). These may be kept in each client's file or in a central file, in accordance with the recipient's own system of recordkeeping.

Recipients must have written policies and procedures to guide their staff in complying with this part and shall maintain records sufficient to document the recipient's compliance with this part (45 CFR § 1636.5).

### **Suggested Audit Procedures**

- Obtain an understanding of the written policies, procedures and recordkeeping in place to ensure compliance with the requirements of this regulation. Ascertain whether the recipient's written policies, procedures and recordkeeping are consistent with the provisions of this regulation.



- Determine how the recipient ensures that the written policies and procedures are communicated to staff and whether these procedures are followed in practice by staff. Interview a sample of recipient staff as to their knowledge concerning the possible existence of any cases where the recipient failed to follow the requirements of this section. Follow up on all such possible occurrences.
- In conjunction with the review of case files, inspect cases filed in court after April 26, 1996 in order to determine whether a written statement of fact (prepared in accordance with this part) was obtained by the recipient prior to filing the lawsuit.

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## **\*1637 RESTRICTION ON LITIGATION ON BEHALF OF A PRISONER**

### **LSC Regulations**

45 CFR §§ 1637.2, 1637.3, 1637.4, 1637.5

### **Compliance Requirement**

After April 25, 1996, recipients may not participate in any civil litigation on behalf of a person incarcerated in a Federal, State or local prison<sup>7</sup> (45 CFR § 1637.3). After August 29, 1996, recipients may not participate on behalf of such an incarcerated person in any administrative proceeding challenging the conditions of incarceration (45 CFR § 1637.3). “Incarcerated” means the involuntary physical restraint of a person who has been arrested for or convicted of a crime; “Federal, State or local prison” means any penal facility maintained under government authority (45 CFR 1637.2). (The specification of penal facility is meant to exclude any non-penal detention facility, such as a juvenile or mental health facility, even one housing the criminally insane, from the definition and, consequently, to allow civil litigation on behalf of persons physically restrained in a mental health facility).

If, to the knowledge of the recipient, a client becomes incarcerated after litigation has commenced, the recipient must use its best efforts to withdraw promptly from the litigation, unless the client's period of incarceration is anticipated to be brief and the litigation is likely to continue beyond the period of incarceration (45 CFR § 1637.4).

Recipients must have written policies and procedures to guide their staff in complying with this part and shall maintain records sufficient to document the recipient's compliance with this part (45 CFR § 1637.5).

Recipients may provide assistance to incarcerated individuals in court appointment or as part of a separately funded public defender project or program.

### **Suggested Audit Procedures**

- Obtain an understanding of the written policies, procedures and recordkeeping in place to ensure compliance with the restrictions detailed in the regulation. Ascertain whether the recipient's written policies, procedures and recordkeeping are consistent with the provisions of the regulation.
- Determine how the recipient ensures that the written policies and procedures are communicated to staff and whether these procedures are followed in practice by staff. Interview a sample of recipient staff as to their knowledge concerning the possible existence of any matter falling under the restrictions of this section. Follow up on all such possible occurrences.
- Review recipient documentation, including the mandatory LSC submissions (i.e., reporting forms CO-3 Prisoner litigation or CO-4 Certification form), evidencing case divestiture pursuant to Section 508(b) of 110 Stat. 1321 (1996) in order to assess any ongoing representation. The auditor should be alert for continuing involvement in prohibited case activity previously reported by the recipient to LSC as having been fully divested.
- In conjunction with the review of case files, and including discussions with the appropriate case handler, ascertain compliance with 45 CFR § 1637.

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## **\*1638 RESTRICTION ON SOLICITATION**

### **LSC Regulations**

45 CFR §§ 1638.2, 1638.3, 1638.4, 1638.5

### **Compliance Requirement**

Recipients are prohibited from representing clients and referring individuals to other recipients as a result of unsolicited in-person advice. In-person unsolicited advice is a face-to-face encounter or a personal encounter via other means of communication (such as a personal letter or telephone call) advising the individual or client, who did not seek that advice or have an attorney-client relationship with the recipient, to obtain counsel or take legal action (45 CFR §§ 1638.2, 1638.3).

This part does not prohibit recipients or their employees from providing information regarding legal rights and responsibilities or providing information regarding the recipient's services and intake procedures through community legal education activities such as outreach, public service announcements, maintaining an ongoing presence in a courthouse to provide advice at the invitation of the court, disseminating community legal education publications, and giving presentations to groups that request them (45 CFR § 1638.4(a)). Nor does it prohibit

representation or referral of clients by recipients pursuant to a statutory or private ombudsman program that provides investigatory and referral services and/or legal assistance on behalf of persons who are unable to seek assistance on their own, including the

institutionalized or physically or mentally disabled (45 CFR §1638.4).

Recipients must have written policies to implement the requirements of this part (45 CFR § 1638.5).

### **Suggested Audit Procedures**

- Obtain an understanding of the written policies in place to ensure compliance with the requirements and restrictions in order to determine if the recipient's written policies are consistent with the provisions of this regulation.
- Determine how the recipient ensures that the policies are communicated to staff. Interview recipient staff as to their knowledge concerning the possible existence of any matter falling under the restrictions of this section. Follow up on all such possible occurrences.

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## **\*1639 WELFARE REFORM**

### **LSC Regulations**

45 CFR §§ 1639.2, 1639.3, 1639.4, 1639.5, 1639.6

### **Compliance Requirement**

Except as provided below, recipients may not initiate legal representation, or participate in any other way in litigation, lobbying or rulemaking, involving an effort to reform a Federal or State welfare system. Prohibited activities include participation in: (a) Litigation challenging laws or regulations enacted as part of an effort to reform a Federal or State welfare system; (b) Rulemaking involving proposals that are being considered to implement an effort to reform a Federal or State welfare system; (c) Lobbying before legislative or administrative bodies undertaken directly or through grassroots efforts involving pending or proposed legislation that is part of

an effort to reform a Federal or State welfare system (45 CFR §1639.3).

The scope of the two definitions in this regulation is critical to its interpretation:

(a) *An effort to reform a Federal or State welfare system* includes all of the provisions, except for the Child Support Enforcement provisions of Title III, of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Personal Responsibility Act), 110 Stat. 2105 (1996), and subsequent legislation enacted by Congress or the States to implement, replace

or modify key components of the provisions of the Personal Responsibility Act or by States to replace or modify key components of their General Assistance or similar means-tested programs conducted by States or by counties with State funding or under State mandates;

(b) *Existing law* means Federal, State or local statutory laws or ordinances which are enacted as an effort to reform a Federal or State welfare system and regulations issued pursuant thereto that have been formally promulgated pursuant to public notice and comment procedures (45 CFR §1639.2).<sup>8</sup>

Recipients may represent an individual eligible client who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise

challenge existing law in effect on the date of the initiation of the representation (45 CFR § 1639.4).

Consistent with the provisions of § 1612.6(a) through (e), recipients may use non-LSC funds to comment in a public rulemaking proceeding or respond to a written request for information or testimony from a Federal, State or local agency, legislative body, or committee, or a member thereof, regarding an effort to reform a Federal or State welfare system (45 CFR § 1639.5).

Recipients must have written policies and procedures to guide their staff in complying with this part (45 CFR § 1639.6).

### **Suggested Audit Procedures**

- Obtain an understanding of the written policies and procedures in place to ensure compliance with the requirements. Determine if the recipient's written policies and procedures are consistent with the provisions of the regulation.
- Determine how the recipient ensures that the written policies and procedures are communicated to staff and whether these procedures are followed in practice by staff. Interview a sample of recipient staff as to their knowledge concerning the possible existence of any matter falling under the prohibitions of this section. Follow up on all such possible occurrences.
- In conjunction with the review of case files, and including discussions with the appropriate case handler, ascertain compliance with 45 CFR § 1639.

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## **\*1642 ATTORNEYS' FEES**

### **LSC Regulations**

45 CFR §§ 1642.2, 1642.3, 1642.4, 1642.6

## Compliance Requirement

Except as noted below, no recipient may claim or collect and retain attorneys' fees for any case filed after April 25, 1996 (45 CFR §1642.3).<sup>9</sup>

An attorneys' fee is an award to compensate an attorney of the prevailing party made pursuant to common law or Federal or State law permitting or requiring the awarding of such fees or a payment to an attorney from a client's retroactive statutory benefits (45 CFR §1642.2(a)).<sup>10</sup> To claim attorneys' fees means to include a request for attorneys' fees in any pleading (45 CFR §1642.2(d)).<sup>11</sup>

Fees may be claimed and collected in a case filed prior to April 26, 1996, except that fees may not be claimed and collected for any additional, related claim arising after April 25, 1996 in such a case. For the purposes of this restriction the following are not considered attorneys' fees and may be claimed and collected for cases filed after April 25, 1996: (1) fees in cases to which a court appoints a recipient or an employee of a recipient to provide representation in a case pursuant to a statute or a court rule or practice equally applicable to all attorneys in the jurisdiction, and in which the recipient or employee receives compensation under the same terms and conditions as are applied generally to attorneys practicing in the court in which the appointment is made; (2) payments made to a recipient or an employee of a recipient pursuant to a grant, contract or other agreement by a governmental agency or other third party for representation of clients; (3) sanctions imposed by a court for violations of court rules, including Rule 11 or discovery rules of the Federal Rules of Civil Procedure,

or similar State court rules; (4) reimbursement of costs and expenses from an opposing party or from a client pursuant to §1642.6.<sup>12</sup> (45 CFR §§1642.2, 1642.3, 1642.4(a)).

The prohibition, with the exceptions listed above, on claiming or collecting and retaining attorney's fees applies also to private attorneys who receive compensation from the recipient to provide legal assistance to eligible clients under the recipient's private attorney involvement (PAI) program, judicare program, contract or other arrangement. However, the prohibition does not apply to private attorneys who undertake representation on a pro bono basis (45 CFR §1642.4(b)).<sup>13</sup>

Any attorneys' fees received by the recipient resulting from representation supported in whole or in part with LSC funds shall be allocated to the fund in which the recipient's LSC grant is recorded in the same proportion that the amount of LSC funds expended bears to the total amount expended by the recipient to support the representation (45 CFR § 1642.5(a)). Attorneys' fees shall be recorded during the accounting period in which the money from the fee award is actually received by the recipient and may be expended for any purpose permitted by the LSC Act, regulations and other law applicable at the time the money is received (45 CFR § 1642.5(b)).

Recipients must have written policies and procedures to guide their staff in complying with this part and shall maintain records sufficient to document the recipient's compliance with this regulation (45 CFR § 1642.7).

## **Suggested Audit Procedures**

- Obtain an understanding of the written policies, procedures and recordkeeping in place to ensure compliance with the regulation. Determine if the recipient's written policies, procedures and recordkeeping are consistent with the provisions of the regulation.
  - Verify, on a test basis, that the cases or circumstances in which fees or payments were received were allowable pursuant to 45 CFR § 1642.4 and including, if applicable, the interpretive guidance provided in Program Letter 97-1.
  - Review and test method of allocating fees and related expenses as associated with fee-generating cases to the various funds. Verify that the fees were recorded in the same fund to which the related expenditures were charged as required by 45 CFR §1642.5(a).
  - Interview the executive director and a sample of recipient attorney staff about the requirements of 45 CFR § 1642 and inquire as to their knowledge of any instances in which fees were received by the recipient but not recorded in the accounting records. Follow-up on all such possible occurrences.
  - Verify that fees awarded to a recipient were not recorded as revenue until received as required by 45 CFR §1642.5(b).
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## **\*OTHER STATUTORY PROHIBITIONS**

Section 1007(b)(8) of the LSC Act prohibits the use of LSC funds to provide legal assistance with respect to any proceeding or litigation which seeks to procure a nontherapeutic abortion or to compel any individual or institution to perform an abortion, or assist in the performance of an abortion, or provide facilities for the performance of an abortion, contrary to the religious beliefs or moral convictions of such individual or institution.

Section 1007(b)(9) of the LSC Act prohibits the use of LSC funds to provide legal assistance with respect to any proceeding or

litigation relating to the desegregation of any elementary or secondary school or school system, except that nothing in this paragraph shall prohibit the provision of legal advice to an eligible client with respect to such client's legal rights and responsibilities.

Section 1007(b)(10) of the LSC Act prohibits the use of LSC funds to provide legal assistance with respect to any proceeding or litigation arising out of a violation of the Military Selective Service Act or of desertion from the Armed Forces of the United States, except that legal assistance may be provided

to an eligible client in a civil action in which such client alleges that he was improperly

classified prior to July 1, 1973, under the Military Selective Service Act or prior law.

## **Public Law 104-134**

### **Abortion**

**SEC. 504.** (a) None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any person or entity (which may be referred to in this section as a "recipient"))

(14) that participates in any litigation with respect to abortion

### **Interim Guidance on Compliance Requirement**

This provision applies the previously existing statutory prohibition to all funding. The restriction in the Act, Section 1007(a)(8), prohibiting all legal assistance (not just litigation) concerning the procurement of non-therapeutic abortions, continues subject to 45 CFR §§ 1610.2 and 1610.3.

### **Assisted Suicide Funding Restriction Act of 1997**

The Assisted Suicide Funding Restriction Act of 1997 ("Anti-Assisted Suicide Act" or "Act"), Pub. L. 105-12, was enacted and became effective on April 30, 1997. The Act expressly applies to the Legal Services Corporation and its grantees and amends Section 1007(b) of the LSC Act. Section 9 of the Anti-Assisted Suicide Act amends Section 1007(b) of the LSC Act by adding subparagraph (11) to paragraph (b) of Section 1007. Section 1007(b) now provides that:

(b) No funds made available by the Corporation under this title, either by grant or contract, may be used -- ... (11) to provide legal assistance in a manner inconsistent with the Assisted Suicide Funding Restriction Act of 1997.

Section 5 of the Anti-Assisted Suicide Act (Restriction on use of Federal funds by advocacy programs) generally prohibits the use of LSC funds for advocacy to assist in, fund or support assisted suicide, euthanasia, or mercy killing, or to bring suit or provide any form of legal assistance for assisted suicide, euthanasia, or mercy killing.

Recipients are currently subject to this restriction and have been since its enactment by Congress on April 30, 1997. Proposed rule 45 CFR Part 1643 Restriction on Assisted Suicide, Euthanasia and Mercy Killing was published for comment in the Federal Register on September 30, 1997. However, as of the date of issuance of this Compliance Supplement, 45 CFR Part 1643 has not yet been published as a final rule and will not be effective before January 1, 1998.

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## OTHER COMPLIANCE REQUIREMENTS

### Accounting Requirements

Recipients are required to adhere to requirements of the Accounting Guide for LSC Recipients (August 1997) including LSC's "Fundamental Criteria of an Accounting and Financial Reporting System."<sup>14</sup> This Accounting Guide sets forth financial accounting and reporting standards for

recipients of LSC funds, and describes the accounting policies, records, and internal control procedures to be maintained by recipients to ensure the integrity of accounting, reporting and financial systems.

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### Property Management Requirements

The recipient must maintain a property management system for its LSC-funded activities that is adequate to meet the standards of the Corporation's Property

Management Manual and the Accounting Guide for LSC Recipients (August 1997).<sup>15</sup>

### Suggested Audit Procedures

- Determine whether the recipient maintains proper records for and adequately safeguards property:
  - a. Obtain an understanding of the recipient's policies and procedures for property management and ascertain if they are in accordance with LSC's Property Management Manual and the Accounting Guide for LSC Recipients (August 1997);
  - b. Select a sample of property transactions and test for adherence to LSC's Property Management Manual and the Accounting Guide for LSC Recipients (August 1997);
  - c. Inquire if a physical inventory of property purchased with LSC funds has been taken recently and, if applicable, test whether any differences between the physical inventory and property records were resolved;
  - d. Identify property acquired with LSC funds during the audit period and trace selected purchases to the property records (Verify that the property records contain the following information about the property: description, including model and serial number or other identification number; source of funds used for acquisition; inventory control number; acquisition date and cost; location; useful life; and, if applicable, date of disposal and sales price); and
  - e. Select a sample of property acquired with LSC funds from the property records and physically inspect the property, including ascertaining whether it is appropriately safeguarded.



- Determine the amount of property dispositions for the audit period and verify that dispositions were properly classified between property acquired with LSC funds and property otherwise acquired.

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### **Grant Award Requirements**

The grant award document(s) may have special terms and conditions that should be considered during the audit. Auditors should determine the significant compliance

requirements from the grant document, and develop audit procedures to test compliance with those requirements.

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## END NOTES

1. Memorandum from John A. Tull, Director, Office of Program Operations, to all LSC Program Directors regarding "Recordkeeping Requirements" (Dec. 8 1997).
2. Attached to this Compliance Supplement is a copy of Program Letter 97-1 issued to provide interpretive guidance to recipients regarding some of the most frequently asked questions concerning the attorneys' fees restriction contained in 45 CFR Part 1642.
3. Under this former standard, if a non-LSC organization was so closely related to an LSC funded grantee that the two were deemed to be "interrelated organizations", all LSC restrictions extended to both organizations. ( See Section 1-7, 1986 LSC Audit and Accounting Guide for definitions.) Funds held by an organization which controlled, was controlled by, or was subject to common control with, a recipient or subrecipient, were subject to the same restrictions as if the funds were held by the recipient or subrecipient. Control was a question of fact and had to be determined by the overall circumstances of the relationship between a recipient and another organization. Regardless of whether a recipient had chosen to be subject to the 1981 or the 1986 Audit and Accounting Guide, LSC considered the funds of interrelated organizations to be subject to all the restrictions on the use of non-LSC funds that applied to the recipient, even if the interrelated organization did not formally receive any LSC funds.
4. "Tribal funds" means funds received from an Indian tribe or from a private nonprofit foundation for the benefit of Indians or Indian tribes (45 CFR §1610.2(h)). This definition under the regulation is slightly broader than the definition found in the LSC Act.
5. If a recipient has a claim for attorneys' fees in a class action filed before April 26, 1996 for work done before August 1, 1996, participation limited to pursuit of such attorneys' fees does not violate this restriction.
6. Prior to April 26, 1996, recipients could use public, IOLTA or tribal funds for redistricting litigation, if the use of funds for such activity was consistent with the purpose for which such funds were provided. Recipients may still use tribal funds for this purpose, if consistent with the purpose for which such funds were provided.
7. Public Law 104-134, permitted recipients to divest themselves of certain prohibited cases including litigation on behalf of incarcerated persons between April 26, 1996 through August 1, 1996. Thus, recipients could still participate during this period in litigation on behalf of incarcerated persons if the litigation was pending on April 26, 1996, while attempting to divest themselves of such lawsuits.
8. The definitions in §1639.2 were broadened in the final rule, effective July 7, 1997. The Interim Rule, with its narrower definitions, was in effect from August 29, 1996 through July 6, 1997 (and by implication from April 26, 1996 through July 6, 1997, as well). The Final Rule restricts activities that were not restricted by the Interim Rule, such as challenges to efforts to reform programs that are governed by the Personal Responsibility Act but are not AFDC or General Assistance, and challenges to regulations implementing welfare reform. Thus, prior to July 7, 1997, these activities not restricted by the Interim Rule were permissible.
9. Because this prohibition gives rise to complex and difficult issues, LSC issued Program Letter 97-1 on August 7, 1997 to further elucidate these issues. Auditors should consult this Program Letter for guidance when it is unclear if a recipient's conduct is consonant with 45 CFR 1642. Because of the difficulty of some of the interpretations, the Program Letter provides that in certain situations, its interpretation of 42 CFR 1642 will be enforced only prospectively after August 7, 1997.

10. The language at the end of this subsection, “or a payment to an attorney from a client’s retroactive statutory benefits” was added in the final regulation and relates to fees in Social Security cases paid to an attorney which come out of a client’s retroactive social security benefits. Such fees may be collected until June 11, 1997 (the effective date of the final regulation). Furthermore, §4 of Program Letter 97-1 provides that after June 11, 1997, a recipient may redirect such fees to the client and, if necessary, receive a check for the payment and, without depositing it, sign it over to the client, while retaining clear documentation of such transaction.

11. Program Letter 97-1 discusses several issues related to the extent of the prohibition on “claiming” fees:

1) The prohibition on claiming attorneys’ fees extends to a claim “on behalf of the client”, but the recipient will not be sanctioned or required to take remedial action if the claim was made before August 7, 1997 and no further action to claim was taken after that date; however, the recipient may not receive any portion of such attorney fees. (See §2 of the Program Letter).

2) The recipient may not assert its professional responsibility under §10 06(b)(3) of the LSC Act as a basis to claim attorney fees because it believes the failure to assert such a claim may jeopardize the client’s interest in the case. In such instance, it must take necessary action under the Rules of Professional Responsibility, such as either declining the case or disclosing this limitation on its representation to the client and accepting the case with the client’s approval of this limitation. (See §7 of the Program Letter).

3) In the particular instance where a program is under contract with a state agency to seek attorneys’ fees on behalf of the state pursuant to a statutory mandate in child support cases, the recipient may seek the fees and turn them over to the state because it is acting as an agent of the state. In any apparently similar situation, a recipient should seek LSC guidance regarding whether the attorneys’ fees restriction applies. (See §6 of the Program Letter).

12. Other than these exceptions, the scope of the prohibition on collecting attorneys’ fees is broad. Its scope is further elucidated in §§3 and 5 of Program Letter 97-1.

1) §3 - It extends to a court award of attorneys’ fees where none had been claimed, but the recipient will not be sanctioned or required to take remedial action if the fees were received before August 7, 1997.

2) §5 - A recipient is not permitted to bypass the restriction by assigning fees for cases filed after April 25, 1996 to a third party.

13. When a program co-counsels with a pro bono attorney, the private pro bono counsel may claim fees, but only for his or her own work. Any such claim must not be a general claim, but rather one specifically on behalf of the co-counsel only. Because of the difficulty of this issue, Program Letter 97-1, §1 provides that this interpretation shall be prospective from August 7, 1997 as to the form of the claim. However, the program may not collect any such fees.

14. The Accounting Guide for LSC Recipients (August 1997) became effective on August 14, 1997, replacing all accounting portions of both the 1981 and 1986 Audit and Accounting Guide. Prior to this date, recipients were required to adhere to accounting requirements of the LSC Audit and Accounting Guide for Recipients and Auditors, and could follow either the 1981 or 1986 version. LSC’s “Fundamental Criteria of an Accounting and Financial Reporting System” was incorporated in Chapter III of the 1986 version of the Audit and Accounting Guide but was also required to be adhered to by users of the 1981 version of the Audit and Accounting Guide. The audit provisions of the 1981 and 1986 versions of the Audit and Accounting Guide were superseded by the LSC Audit Guide, originally adopted in 1995 and revised in 1996.

15. The Accounting Guide for LSC Recipients (August 1997) became effective on August 14, 1997, replacing all accounting portions of both the 1981 and 1986 Audit and Accounting Guide. Prior to this date, recipients were required to adhere to accounting requirements of the LSC Audit and Accounting Guide for Recipients and Auditors (either the 1981 or 1986 version).